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In the Supreme Court of the United States

OCTOBER TERM, 1972

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BELL AEROSPACE COMPANY DIVISION OF TEXTRON INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, *infra,* pp. 21–45) is not yet reported. The Board's decision and order (Pet. App. C, *infra,* pp. 47–59) are reported at 197 NLRB No. 30. The Board's decision in the underlying representation case (Pet. App. D, *infra,* pp. 60–68) is reported at 190 NLRB No. 66; its order denying reconsideration in that proceeding (Pet. App. E, *infra,* pp. 69–75) is reported at 196 NLRB No. 127.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, *infra*, p. 46) was entered on February 28, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly determined that "managerial employees" are covered by the National Labor Relations Act unless their duties are such that it is likely that there would be a conflict of interest between their job responsibilities and their responsibilities to a labor organization.

2. Whether the court of appeals improperly required the Board to conduct rule-making rather than adjudicatory proceedings to determine whether certain employees are "managerial employees."

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix F, *infra*, pp. 76–77.

STATEMENT

A. The Board Proceedings

On July 30, 1970, the Union [1] filed a representation petition with the Board, seeking certification as the bargaining representative of the 25 buyers in the Purchasing & Procurement Department of the Company's Wheatfield, New York plant, which manufactures and sells rocket engines and electronic equip-

[1] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Amalgamated Local 1286.

ment (Pet. App. E, p. 69; A. 9).[2] The Company opposed the petition on the grounds that (1) the buyers were managerial employees and thus excluded from coverage of the Act; and (2) even if the buyers were not managerial employees, there would exist a potential conflict of interest between their obligations to the Union and those to the Company (Pet. App. E, p. 69).

A representation hearing was held at which the following facts were established:

The Purchasing & Procurement Department fills orders from 30 other departments (A. 23). This involves purchasing maintenance and repair items such as fuel oil and light bulbs, support items such as packaging supplies and paper for reproduction, and production items ranging from simple nuts and bolts to very sophisticated components for the equipment the Company manufactures (A. 37, 41). Many purchases are "off the shelf" items, which can be obtained from a number of sources. Other items must be made up according to the Company's specific needs (A. 23, 38).

There are no educational or formal training requirements for the Company's buyers, who are guided in their work by a detailed procurement manual (A. 59, 73, 90–91). In placing orders, the buyers are free to select a vendor, unless the requisitioning department has specified one. If the Department has specified a vendor, the buyer must secure approval before making a change (A. 170–171, 163–166). Buyers may place or cancel orders of less than $5,000 without prior ap-

[2] "A." refers to the printed appendix in the court below. A copy has been lodged with the Clerk.

proval. Larger orders must be approved by a supervisor (A. 30–33). When obtaining sophisticated production items—such as material for the Minute Man missile project, which represents 70 percent of the Company's sales—purchasing decisions are made by a team of supervisory personnel from the engineering, quality assurance, finance, and manufacturing departments. The buyer acts as spokesman for the group in dealing with prospective vendors, but, for high cost projects, the Chief of Finance participates in price negotiations. (A. 79–81, 87–88.) For such items, detailed specifications, including engineering blueprints, are included in the requisitions (A. 130–133).

The Board, following its decision in *North Arkansas Electric Cooperative, Inc.*, 185 NLRB No. 83, 75 LRRM 1068, where it had "found that, with the limitations there noted, 'managerial' employees are employees within the meaning of the Act and entitled to its protection," concluded that, "even though, as the Employer argues, the buyers may be 'managerial' employees, * * * as employees they are entitled to be represented under the Act, unless there is some cogent reason for denying such representation" (Pet. App. D, p. 61; A. 245). The Board further concluded that the record did not substantiate the Company's claim that the buyers' authority to commit the Company's credit, to select vendors, and to influence "make or buy decisions" created "a potential conflict of interest between the buyers as union members and the Em-

ployer" (Pet. App. D, pp. 62–63; A. 245–246).[3] Accordingly, the Board held that the Company's buyers were entitled to representation rights under the Act, and, finding that a unit of buyers was appropriate for collective bargaining purposes, directed an election in that unit (Pet. App. D, pp. 64–66; A. 247–249). The Union won the election by a vote of 15 to 9, and was certified by the Board as the buyers' bargaining representative (Pet. App. D, pp. 66–68; A. 251–253).

The Company moved the Board for reconsideration, noting that the Eighth Circuit[4] had recently denied enforcement of the Board's order in *North Arkansas Electric* (A. 254–255). The Board denied reconsideration (Pet. App. E, pp. 69–75; A. 256–262), stating that it disagreed with the Eighth Circuit that Congress, in 1947, had manifested an intent to exclude all managerial personnel from the coverage of the Act. The Board held that Congress was merely concerned with preserving the Board's practice of excluding "personnel associated with the formulation and implementation of labor relations policies." (Pet. App. E, pp. 72–73; A. 258–259.) The Board concluded that, in determining whether employees who have discretion in the formulation, determination, and effectua-

[3] The Board noted that "this is a factual issue, to be determined on the record of each case, in which any particular segment of managerial employees may seek to be represented by a labor organization" (Pet. App. D, p. 64, n. 3; A. 247, n. 3).

[4] *National Labor Relations Board* v. *North Arkansas Electric Cooperative, Inc.*, 446 F. 2d 602 (discussed *infra*, p. 15).

tion of employer policies are excluded from the Act, "the fundamental touchstone" is whether their duties and responsibilities "do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization" (Pet. App. E, p. 74; A. 261). Applying that principle, the Board affirmed its earlier findings that union representation of the Company's buyers would not tend to create a conflict of interest, and that there was a sufficient community of interest among these buyers so that they constituted a separate appropriate unit for collective bargaining (Pet. App. E, p. 75; A. 262).

The Company refused to bargain with the Union, an unfair labor practice complaint issued, and the Board found that the Company had violated Section 8(a)(5) and (1) of the Act. The Board ordered the Company to bargain with the Union. (Pet. App. C, pp. 47–59.)

B. The Decision of the Court of Appeals

The court of appeals concluded that all true managerial employees are excluded from the coverage of the Act. The court reasoned as follows (Pet. App. A, pp. 38–39):

> The 1947 Congress clearly believed that at least some "managerial employees" other than "supervisors" were excluded from the protections of the Act. [Footnote omitted.] In 1956 the Board concluded that the Congress had meant to exclude all true "managerial employees". This exclusion embraced not only an

> employee "so closely related to or aligned with management as to place the employee in a position of conflict of interest between his employer on the one hand and his fellow workers on the other" but also one who is "formulating, determining and effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties," *Illinois State Journal-Register, Inc.* v. *NLRB*, 412 F. 2d 37, 41 (7 Cir. 1969). Both because of what we believe to have been the understanding of the 1947 Congress and because the Board's interpretation of it had been so clearly defined for the 1959 Congress, the Board is not now free to decide the contrary * * *.

The court added, however, that "the Board would [not] be precluded, on proper proceedings, from determining that buyers, or some types of buyers, are not true 'managerial employees' and consequently come within the protection of § 8(a)(5) and (1)" (Pet. App. A, p. 39). It ruled that there was "substantial evidence that Bell's buyers were not sufficiently high in the hierarchy to constitute 'managerial employees' as that term has been defined" in *Illinois State Journal, supra* (Pet. App. A, p. 39). Nevertheless, the court denied enforcement of the Board's order for two reasons.

First, "we cannot be sure that the Board's decision rested on such a factual determination rather than on its new, and in our view, erroneous holding that it was free to regard *all* managerial employees as covered by the Act unless their duties met" the conflict of interest touchstone (Pet. App. A, p. 40). *Second,*

"while the Board was not precluded from reversing itself on the position that buyers, or some buyers, were not 'managerial employees,' we hold that, particularly in light of the justified contrary belief the Board had engendered, it could not do this in the manner that was done here"; rather, it should have conducted a rule-making proceeding in conformity with Section 4 of the Administrative Procedure Act (Pet. App. A, pp. 40–41). The Court remanded the case to the Board to conduct a rule-making proceeding (Pet. App. A, pp. 43–45).

REASONS FOR GRANTING THE WRIT

1. The holding of the court of appeals that all "managerial employees" are excluded from the coverage of the Act is erroneous and results in denying the benefits of the Act to a large number of employees who are entitled thereto. Review by this Court of that holding is therefore warranted.

a. Section 2(3) of the Wagner Act provided that "The term 'employee' shall include any employee * * * but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse * * *." The Board early ruled that "[t]he statutory definition is of wide comprehension," and that it covered "managerial"[5] and

[5] Managerial employees are "employees who are in a position to formulate, determine, and effectuate management policies. These employees * * * express and make operative the decisions of management." *Ford Motor Co.*, 66 NLRB 1317, 1322. For examples of the types of employees whom the Board has considered to be managerial, see *Spicer Mfg. Corp.*, 55 NLRB

"supervisory" employees. *Atlantic Greyhound Corp.*, 7 NLRB 1189, 1196; accord: *Dravo Corp.*, 54 NLRB 1174, 1177; *Soss Mfg. Co.*, 56 NLRB 348, 353–354. The Board also held, however, that managerial employees could not be included in bargaining units of rank-and-file employees. Thus, in *Vulcan Corp.*, 58 NLRB 733, 736, a buyer who spent 75 per cent of his time away from the plant was excluded from a production and maintenance unit "[b]ecause of the responsibility of his position and his peculiar relationship to management and * * * the fact that his interests are apparently different from those of the production and maintenance employees." Similarly, in *Hudson Motor Car Co.*, 55 NLRB 509, 512, the Board excluded buyers who "purchase all materials required by the Company," because "their duties are closely allied to management, differing materially from those of the

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1491, 1498 (expediters who placed and reassigned orders to expedite tool delivery); *Vulcan Corp.*, 58 NLRB 733, 736, and *Swift & Co.*, 115 NIRB 752, 753 (buyers who spent a substantial part of their time making purchases for the employer's account); *General Telephone Co. of Ohio*, 112 NLRB 1225, 1229 (local commercial representatives who dealt with the public, including handling their complaints). For examples of employees held not to be managerial, see *Eastern Camera and Photo Corp.*, 140 NLRB 569, 571 (manager of one-employee store with limited discretion to set prices); *Illinois State Journal-Register* v. *National Labor Relations Board*, 412 F. 2d 37, 41–43 (C.A. 7) (managers of newspaper delivery service with limited authority with respect to management policy); *Retail Clerks Int'l Ass'n* v. *National Labor Relations Board*, 366 F. 2d 642, 644–645 (C.A. D.C.), certiorari denied, 386 U.S. 1017, and *Int'l Ladies Garment Workers' Union* v. *National Labor Relations Board*, 339 F. 2d 116, 123 (C.A. 2) (union representatives whose exercise of discretion was limited by established policy).

other clerical employees." See, also, *Friez & Sons*, 47 NLRB 43, 47; *Electric Controller & Mfg. Co.*, 69 NLRB 1242, 1245–1246; *Barrett Division, Allied Chemical & Dye Corp.*, 65 NLRB 903, 905.

The Board also excluded supervisory employees from units of rank-and-file employees (see *Spicer Mfg. Corp.*, 55 NLRB 1491), and held that even a separate unit of supervisory personnel would not be appropriate. *Maryland Drydock Corp.*, 49 NLRB 733. In *Packard Motor Car Co.*, 61 NLRB 4, however, the Board found appropriate a separate unit of foremen, on the ground, *inter alia*, that under "our consistent and now well settled position * * * supervisors are 'employees' within the meaning of Section 2(3) of the Act" (*id.* at 6). This Court sustained the Board's decision, finding "nothing in the Act which indicates that Congress intended to deny its benefits to foremen as employees, if they choose to believe that their interests as employees would be better served by organization [rather] than by individual competition." *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 490.

b. In the 1947 Taft-Hartley Amendments of the Act, Congress overturned the *Packard* ruling that supervisory employees were subject to the Act. The legislative history of those Amendments shows, however, that, with one exception not here applicable, Congress did not intend to change the Board's interpretation that the Act covered management employees.

The House Bill excluded supervisors from the definition of employees, and defined a supervisor as including not only those individuals with power to

hire, transfer, promote, discharge, reward, or discipline other employees, or effectively to recommend such action, but also: (1) personnel who fix or make effective recommendations with respect to the amount of wages earned by other employees, and those who make effective recommendations with respect to the application of factors upon which wages are determined; (2) labor relations, time-study, police and guard personnel; and (3) confidential employees. The Bill defined the latter as any individual "who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." Sec. 2(12) of H.R. 3020, 80th Cong., 1st Sess., 10–11, as passed by the House, 1 Legislative History of the Labor Management Relations Act, 1947 (hereafter "Leg. Hist.") 167–168.

The House Report explained that "when the foremen unionize, even in a union that claims to be 'independent' of the union of rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them." H. Rep. No. 245, 80th Cong., 1st Sess., 14; 1 Leg. Hist., *supra*, at 305. Respecting the exclusion of confidential employees, the House Report added: "The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these. But protecting confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets

ought not to rest in the administrative discretion of the Board or on the responsibility of whatever union happens to represent the employees." H. Rep. No. 245, *supra*, at 23; 1 Leg. Hist., *supra*, at 314.

The Senate Bill also excluded supervisors from the coverage of the Act, but defined that term more narrowly than did the House Bill:

> (11) The term "supervisor" means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, [or responsibly to direct them], or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. [Sec. 2(11) of S. 1126, 80th Cong., 1st Sess., 6; 1 Leg. Hist., *supra*, at 104.]

The Senate Report explained that unionization of supervisors "into organizations composed of or subservient to the unions of the very men they were hired to supervise" had led to a diminution in disciplinary action by supervisors and an increase in industrial accidents, and threatened to deprive management "of the undivided loyalty of its foremen." The Report added: "In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in [the] act. It has therefore distinguished between straw bosses, leadmen, set-up-men, and other minor supervisory employees * * * and the super-

visor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." S. Rept. No. 105, 80th Cong., 1st Sess., 3–5; 1 Leg. Hist., *supra*, at 409–411.

The Conference Committee accepted the Senate's definition of supervisor.[6] With reference to those additional employees who had been included within the House, but not within the Senate, definition, the Conference Report stated:

> In the case of persons working in the labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. * * * [H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35; 1 Leg. Hist., *supra*, at 539.]

In sum, prior to the 1947 amendments, the Board had held that the Act covered both managerial employees and supervisory employees, but that those employees should not be included in rank-and-file bargaining units. In the 1947 amendments, Congress specifically excluded supervisory employees from the coverage of the Act, but manifested no intention to

[6] The definition contained in S. 1126 had been slightly modified by the Senate. It accepted an amendment proposed by Senator Flanders which added the phrase "or responsibly to direct them." 93 Cong. Rec. 4677–4678; 2 Leg. Hist., *supra*, at 1303–1304.

alter the Board's preexisting practice with respect to managerial employees except in one respect. It noted that the specific exclusion for "persons working in the labor relations, personnel and employment departments" contained in the House Bill was unnecessary "since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act" (*supra,* p. 13). As the Board noted here (Pet. App. E, p. 72; A. 259): "The rationale underlying the Board's history of excluding such employees rests of course upon the premise that conflicts of interest are likely to arise between the collective employee group represented by a labor organization and personnel working as, with, or for management representatives whose area of responsibility includes bargaining with such a labor organization."

2. In the light of this legislative history, the Board correctly held that Congress did not intend to exclude all managerial employees from the coverage of the Act, but rather left it to the Board to determine "those managerial types who ought properly to be excluded," on the basis of "an examination as to whether the duties and responsibilities of any managerial employee or group of managerial employees do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization" (Pet. App. E, p. 74; A. 261). The contrary conclusion of the court below and of the Eighth Circuit in *National Labor Relations Board*

v. *North Arkansas Electric Cooperative, Inc.*, 446 F. 2d 602, rests upon the erroneous premise that, because Congress manifested an intent "to exclude a specific type of managerial personnel," *i.e.*, those concerned with the formulation and implementation of labor relations policies, "it thereby meant *all* managerial personnel, conceivably even those whose only 'managerial' functions involve a determination of what sources of supply should be used in making purchases of less than $5,000" (Pet. App. E, p. 72; A. 259). Nothing in the legislative history of the 1947 amendments to the Act or in the dissenting opinion in *Packard, supra*,[7] warrants that assumption.

The Board's decision in *Swift & Co.*, 115 NLRB 752, 753–754, does not justify the court of appeals' decision in this case. There the Board, in holding that a separate unit of poultry procurement drivers could not be considered appropriate for collective bargaining because the drivers were "representatives of management," stated that "[i]t was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management"—"[s]uch individuals cannot be deemed to be employees for purposes of the Act." This single sweeping and inaccurate statement does not vitiate the other indications detailed above that Congress did not intend such

[7] The dissenters in *Packard* were of the view that the Act should be construed as putting "in the employer category all those who acted for management not only in formulating but also in executing its labor policies." 330 U.S. at 496; see also *id.* at 500. The Board's test would exclude from the coverage of the Act managerial employees who were so involved with labor policies (see Pet. App. E, pp. 73–74; A. 260–261).

a blanket exclusion for managerial employees.[8] The Board was not precluded from subsequently correcting the statement. See *North Arkansas Electric Cooperative, Inc.*, 185 NLRB No. 83, p. 5, n. 8, 75 LRRM 1068, 1069, n. 8. Cf. *Packard, supra*, 330 U.S. at 492.

3. The further holding of the court below that the Board, on remand, must determine whether the Act covers the buyers through a rule-making, rather than an adjudicatory, proceeding, is contrary to settled principles governing the discretion of an administrative agency to select the appropriate procedure for deciding particular issues.

a. In *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194, this Court held that, while "[t]he function of filling in the interstices of the [Securities] Act should be performed, as much as possible, through [the] quasi-legislative promulgation of rules to be applied in the future * * * any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise" (*id.* at 202). The Court added that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one

[8] Indeed, despite the broad language in the Board's decision in *Swift*, the District of Columbia Circuit, in a secondary boycott proceeding, interpreted it as being applicable only to buyers who, like those in *Swift*, were acting as agents of their employers. The court found that the buyers in the case before it, who were employed by meat markets, were "so identified with employee and Union activity as to be within the statutory meaning of 'employees' for purposes of section 8(b)(4)(A)." *Amalgamated Meat Cutters, Local 88* v. *National Labor Relations Board*, 237 F. 2d 20, 27 (C.A. D.C.), certiorari denied, 352 U.S. 1015.

that lies primarily in the informed discretion of the administrative agency" (*id.* at 203).

National Labor Relations Board v. *Wyman-Gordon Co.*, 394 U.S. 759, reaffirmed these principles. The plurality opinion there recognized that "[a]djudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein" (*id.* at 765). The concurring opinion of three other Justices emphasized that Congress had given the Board both quasi-legislative and quasi-judicial powers, that "[n]o language in the National Labor Relations Act requires that the grant or the exercise of one power was intended to exclude the Board's use of the other," and that the choice between the two "lies primarily in the informed discretion of the administrative agency" (*id.* at 771–772).[9]

b. The Board acted reasonably in determining the status of the Company's buyers in an adjudicatory, rather than a rule-making, proceeding. The court below assumed that the Board was "prescribing a new policy, not just with respect to 25 buyers in Wheatfield, N.Y., but * * * 'to fit all cases at all times' "

[9] The factor in *Wyman-Gordon* which disturbed the four Justices who subscribed to the plurality opinion, and caused two Justices to dissent, was not that the Board had formulated the name and address requirement in an adjudicatory proceeding, the *Excelsior* case. Rather, it was that, by declining to apply the requirement in the *Excelsior* case itself, and instead directing that it be applicable to all election proceedings arising 30 days thereafter, the Board appeared to be engaging in rule-making without complying with Section 4 of the Administrative Procedure Act. See 394 U.S. at 763–765, 775–777, 780–781. No comparable circumstances exists here. The Board, after examining the facts of this particular case, made a determination that the duties of the Company's buyers were not such as would be likely to create a conflict of interest and thus deprive them of the protection of the Act.

(Pet. App. A, p. 43). As shown (pp. 8–10), however, the Board's view that managerial employees, while properly excluded from certain bargaining units are not automatically excluded from the Act's coverage, is not novel, and the contrary view expressed in *Swift* was an abberation.

The inquiry involved in determining whether the Act covers particular managerial employees necessarily must focus on the nature and level of the duties they perform. In addition, the duties of managerial employees will vary from industry to industry, company to company, and even among employees within the same company. For these reasons, the managerial employee question is best decided on a case-by-case basis. The Board repeatedly emphasized that it was following that procedure here (see *supra*, n. 3, p. 5; Pet. App. E, p. 74, A. 261).

3. The decision of the court of appeals has far-reaching consequences. It excludes from the coverage of the Act a large number of employees who are formulating, determining, and effectuating their employer's policies, unless their discretion relates to relatively minor matters or is carefully limited by existing standards. The court below acknowledged that "[t]here must be tens of thousands of manufacturing, wholesale and retail units which employ buyers, and

[10] Since this Court's decision in *Wyman-Gordon*, the Board has instituted rule-making proceedings in those areas where, in its judgment, they were appropriate—*i.e.*, the promulgation of standards for the exercise of jurisdiction over private colleges and universities, the horseracing and dogracing industries, and symphony orchestras (see Pet. App. A, p. 40, n. 14).

hundreds of thousands of the latter" (Pet. App. A, p. 43). Buyers, of course, comprise only one of the many groups of employees concerned with formulating or effectuating the employer's policies.

By requiring the Board to conduct a rule-making proceeding to determine the application of the Act to buyers, the court below has required the Board to follow a procedure which is likely to impede, rather than enhance, a prompt resolution of that question. In view of the large number of buyers in American industry and the various functions they perform, a proceeding which attempts to formulate criteria to govern the entire class is likely to produce only broad general standards. Those standards are likely to be of little utility until they acquire concrete meaning through application to particular factual situations. The decision below is thus likely to delay the prompt enforcement of the Act and to produce substantial additional litigation which would be avoided by the Board's settled practice of deciding the applicability of the Act to particular types of employees on a case-by-case basis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1973.

APPENDIX A

United States Court of Appeals for the Second Circuit

Nos. 351, 352—September Term, 1972.

(Argued January 17, 1973 Decided February 28, 1973)

Docket Nos. 72-1703—72-1860

BELL AEROSPACE COMPANY DIVISION OF TEXTRON, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Before FRIENDLY, *Chief Judge,* OAKES AND TIMBERS, *Circuit Judges.*

Petition to review and cross-petition to enforce an order of the National Labor Relations Board, 197 N.L.R.B. No. 30 (1972), finding that Bell Aerospace Company Division of Textron, Inc., had violated § 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain with a union representing buyers. See 190 N.L.R.B. No. 66 (1971) and 196 N.L.R.B. No. 127 (1972). Remanded for a rule-making proceeding.

FRIENDLY, *Chief Judge:*

I

A petition by the Bell Aerospace Company Division of Textron Inc. (Bell) to review and a cross-petition

by the National Labor Relations Board to enforce a bargaining order, 197 N.L.R.B. No. 30 (1972), put in question the Board's earlier order in a representation case, 190 N.L.R.B. No. 66 (1971), *adhered to on a denial of reconsideration,* 196 N.L.R.B. No. 12*1* (1972). The representation order found that 25 buyers in Bell's Department 121 constituted an appropriate unit and directed an election, which was won by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Amalgamated Local 1286 (the Union). Bell refused to recognize the Union on the ground that the buyers were managerial employees and, as such, were not employees protected by §§ 7 and 8(a) of the National Labor Relations Act.

There is not much dispute about the facts: The buyers have full discretion, without limit in dollar amount, in selecting prospective vendors, preparing invitations to bid, evaluating bids, negotiating prices and terms, and preparing purchase orders. They execute all purchase orders up to $50,000, although they must obtain the approval of a superior for any commitment exceeding $5,000.[1] Many purchases are "off the shelf" items, which are made in quantity for the general public and can be purchased from a number of distributors or sources; many are not. In some instances other Bell employees (many of them organized) or a subcontractor will have tentatively selected a vendor, and the buyer must get approval before seeking a different one. For the Minute Man project, which represents about 70% of Bell's sales,

[1] Despite this limitation, the amount of company credit which a buyer can commit on his own authority is very substantial. For one buyer this was $1,351,983 in a 19-month period; during the same period, the aggregate amount of credit committed by the buyers without higher approval was $7,671,172.

major decisions are made by a team consisting of supervisory type personnel[2] from the engineering, quality assurance, manufacturing and finance departments; the buyer is team chairman and signs the purchase forms but a supervisor from pricing and negotiations participates in working out the terms. Once agreement is reached, the buyer is responsible for seeing that contracts are complied with and adjusting disputes. Where the amount is less than $5,000, the buyer has authority to cancel a contract and place the order with an alternate vendor.

The case first came before the Board by transfer from the Regional Director in October, 1970. On May 20, 1971, a unanimous Board issued a direction of election, 190 N.L.R.B. No. 66, relying heavily on its recent decision in *North Arkansas Electric Cooperative, Inc.*, 185 N.L.R.B. No. 83 (1970). *North Arkansas* concerned the discharge of one Lenox, an "electrification advisor," who had been discharged for failing to remain neutral during a union organizational campaign. On the Board's application for enforcement of an earlier order requiring reinstatement, 168 N.L.R.B. 921 (1967), the Eighth Circuit held that the Board's determination that Lenox was not a "managerial employee" was in error but remanded for determination whether his discharge was nevertheless in violation of the National Labor Rela-

[2] Supervisors are excluded from the National Labor Relations Act's definition of employee. See 29 U.S.C. § 152(3). Supervisors are defined as "having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." *Id.* § 152(11).

tions Act, *NLRB* v. *North Arkansas Electric Cooperative, Inc.*, 412 F.2d 324 (8 Cir. 1969).[3] The Board, on remand, held that the Act's protections extended to most managerial employees in general and to Lenox in particular, *North Arkansas Electric Cooperative, Inc., supra*, 185 N.L.R.B. No. 83.[4] This disposed, as far as the Board was concerned, of what had been Bell's prime contention in the instant case, namely, that the buyers did not constitute an appropriate unit for col-

[3] The court, convinced that had the question of Lenox's managerial status arisen in the context of a representation proceeding, the Board, in accordance with its prior decisions, would have excluded him from the bargaining unit as a "managerial employee," said that the Board could not "irrespective of the illegality or unfairness of the discharge, be permitted to reach a different result because the question is presented in the context of unfair labor practice." 412 F.2d at 328. However, in remanding to the Board, the court left open the question whether a "managerial employee," while normally excluded from bargaining units of rank and file employees, might under some circumstances be protected from his employer's unfair labor practices. *Id.* at 325.

[4] The Board's rationale was that an employee might be "managerial" insofar as he did not have "the requisite community of interest" with other employees to be included with them in a proposed unit, yet might still fall within the Act's definition of employee and therefore be entitled to its protections. At the same time, however, the Board indicated that certain categories of managerial personnel would not be considered within the definition of employee and therefore not receive any of the Act's protections—namely, those employees who participated in formulating, determining or effectuating policy with respect to employee relation matters, who had apparent authority in that area, or who had a conflict of interest between proper performance of their jobs and their right to engage in concerted activity. The Board found that Lenox did not fit into any of these categories.

In footnote 8 of its decision, the Board overruled *Swift & Co.*, 115 N.L.R.B. 752 (1956), to the extent that it was inconsistent with its views. See discussion, *infra*.

lective bargaining within § 9(b) since they were managerial employees,[5] the Board proceeded to reject the alternative contention "that buyers, whether considered managerial or not, are to be denied representation because there would exist a potential conflict of interest between the buyers as union members and the Employer"—notably by preferring unionized vendors and influencing "make or buy" decisions in favor of "make," thus creating additional work for sister unions in the plant.[6]

On the very day on which the Board certified the Union, the Eighth Circuit denied enforcement of the Board's second order in *NLRB* v. *North Arkansas Electric,* 446 F.2d 602 (8 Cir. 1971). On the basis of a review of the legislative history of the Taft-Hartley Act, 446 F.2d at 605–08, and of court decisions with respect to application of the Act to "managerial employees," the court held that Congress did not intend the word "employee" to embrace them.[7] No application was made for certiorari.

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[5] Although the Board in *North Arkansas Electric Cooperative, Inc., supra,* 185 N.L.R.B. No. 83, had indicated a continuing adherence to its policy of excluding managerial employees from bargaining units of rank and file personnel because of a lack of "community of interest," the Board, in the instant case, apparently felt that no such consideration opposed formation of a separate unit of buyers.

[6] The decision does not make clear whether the Board regarded the buyers as managerial employees. Footnote 2 shows that Member Jenkins thought they weren't but Member Kennedy thought they were. Footnote 3 indicates that the three other members also thought the latter.

[7] The court rejected the Board's attempt to reformulate the definition of "managerial employee," and decried any notion that an employee could be considered within the Act's definition of "employee" for the purpose of being protected from firing by his employer for participating in union activity but not for the purpose of organization in a proper bargaining unit. 446 F.2d at 609–10; see n.4 *supra.*

Predictably Bell moved for reconsideration, which the Board denied in another opinion, 196 N.L.R.B. No. 127 (1972). Disagreeing with the breadth of the Eighth Circuit's opinion, the Board restated the position it had taken in *North Arkansas*. See fn. 4 *supra*. It held that managerial employees were excluded from coverage only if they make "determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization." This category included not only "those concerned with management policies in the labor relations area," but also those having "responsibility with respect to policies which are inextricably intertwined and of necessity affect or infringe upon the labor relations area." It gave as an example "a corporate representative, charged with the duty of determining where an employer's plants should be located or what capital expenditures a corporation ought to make" if he had "broad managerial discretion." The same might be true of "those bearing primary responsibility for determination of financial policies, or even those charged with the direction of basic policies in the field of research and development." The Board emphasized that the question whether "the probabilities of such conflict are sufficiently minimal" was to be determined on the facts of each case.

II

The issue here tendered must be considered in light of the confusing pattern of Board decisions before and after enactment of the Taft-Hartley Act in 1947, 61 Stat. 136 *et seq.*, and the less than pellucid legislative history of the provision of that statute that is here relevant.

The concept of the "managerial employee" seems to have first arisen in National Labor Relations Act cases in which either employers or unions argued for the exclusion from proposed larger bargaining units of certain employees with a close relationship to management. In *Julian P. Friez & Sons,* 47 N.L.R.B. 43, 47 (1943), the Board ruled that employees, who were charged with expediting the completion of orders and assuring adherence to production time schedules, were "closely related to the management," and therefore should be excluded from a unit of production and maintenance employees. Expediters, who contacted vendors, placed orders, kept records of the progress of deliveries and had authority to reassign orders, were excluded from a unit of office, clerical, technical and professional employees in *Spicer Manufacturing Corp.,* 55 N.L.R.B. 1491, 1498 (1944), because "the authority possessed by these employees to exercise their discretion in making commitments on behalf of the Company stamps them as managerial." See also *Rex Manufacturing Co., Inc.,* 7 N.L.R.B. 95, 99 (1938); *Westinghouse Air Brake Co.,* 64 N.L.R.B. 547, 553 (1945); *Electric Controller & Manufacturing Co.,* 69 N.L.R.B. 1242, 1245–46 (1946). In a number of cases this principle as applied to buyers. See, *e.g., Hudson Motor Car Co.,* 55 N.L.R.B. 509, 512 (1944): *Vulcan Corp.,* 58 N.L.R.B. 733, 736 (1944); *Barrett Division Allied Chem. & Dye Corp.,* 65 N.L.R.B. 903, 905 (1946). Shortly before enactment of the Taft-Hartley amendments, the Board summed up its position as regards "managerial employees" in *Ford Motor Co.,* 66 N.L.R.B. 1317, 1322 (1946) (footnote omitted):

> We have customarily excluded from bargaining units of rank and file workers executive employees who are in a position to formulate, determine, and effectuate management policies.

> These employees we have considered and still deem to be "managerial," in that they express and make operative the decisions of management.

While the Board's policy was clearly not to permit managerial employees to join units of rank and file personnel, the Board nonetheless viewed at least minor managerial employees as within the Act's definition of "employee." In an early decision, the NLRB, holding that a dispatcher was an "employee" and therefore protected by the Act against his employer's unfair labor practices, said:

> [The employee's] position as dispatcher . . . was of a minor supervisory character. Although antiunion conduct of managerial or supervisory employees has been repeatedly held to be proof that the employer has engaged in unfair labor practices, it does not follow that managerial or supervisory employees are not employees within the meaning of Section 2(3) of the Act. The statutory definition is of wide comprehension.

Atlantic Greyhound Corp., 7 N.L.R.B. 1189, 1196 (1938) (footnote omitted). And in *Dravo Corp.*, 54 N.L.R.B. 1174 (1944), a case in which the Board excluded buyers and expediters from a unit of office and clerical workers, it stated:

> Since the work of both buyers and expediters requires much greater initiative and more direct contact with outsiders, and is of a much more responsible nature than that of employees in categories which the parties would include in the unit, we are of the opinion that it would best serve the policies and purposes of the Act to exclude the buyers and expediters from the . . . unit. *This is not to say, however, that buyers and expediters are to be denied the right to self-organization and to collective bargaining under the Act.* The precise relationship

> of the buyers and expediters to management here is not now being determined by us.

Id. at 1177 (emphasis added).

The Board took a somewhat different tack in *Maryland Drydock Co.*, 49 N.L.R.B. 733 (1943), where it found that a *separate* union of supervisory personnel would not constitute an appropriate unit for collective bargaining, although still insisting that a supervisor was an "employee" as defined by the Act, *id.* 737–38. See *Packard Motor Co.*, 64 N.L.R.B. 1212, 1214 (1945) (Herzog, Chairman, concurring); *Packard Motor Co.* v. *NLRB*, 330 U.S. 485, 492 n.3 (1947). Similarly, in *Yale & Towne Manufacturing Co.*, 60 N.L.R.B. 626 (1945), *overruled in other respects, Ford Motor Co., supra,* 66 N.L.R.B. at 1322 n.12, the Board found the interests of certain time-study employees were sufficiently akin to those of management that the employees "should neither be included in a unit with other employees, *nor established as a separate unit.*" *Id.* at 628–29.

Maryland Drydock was overruled in *Packard Motor Co.*, 61 N.L.R.B. 4, 64 N.L.R.B. 1212 (1945), and the Board's decision that foremen were "employees" whom the Act entitled to form their own union was approved by the Supreme Court, *Packard Motor Co.* v. *NLRB, supra,* 330 U.S. 485, *aff'g* 157 F. 2d 80 (6 Cir. 1946). Since an important purpose of Congress in passing the Taft-Hartley amendments was to overturn that decision, see H.R. Rep. No. 245, 80th Cong., 1st Sess. 13–14, 17 (1947) and S. Rep. No. 105, 80th Cong., 1st Sess. 3–5 (1947), the dissenting opinion in *Packard* is more than ordinarily important. Mr. Justice Douglas, joined by Chief Justice Vinson and Justice Burton, there wrote, 330 U.S. at 494:

> For if foremen are "employees" within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents—indeed, all who are on the payroll of the company, including the president; all who are commonly referred to as the management, with the exception of the directors. If a union of vice-presidents applied for recognition as a collective bargaining agency, I do not see how we could deny it and yet allow the present application.

Arguing that, when Congress desired to include supervisory personnel in a category of employees, it knew how to do so, he called attention to other statutes *in pari materia* which, unlike the National Labor Relations Act, defined "employee" to include a "subordinate official," Railway Labor Act of 1926, 44 Stat. 577; Merchant Marine Act of 1936, 52 Stat. 953, 966.

As indicated, the introduction of H.R. 3020 in 1947 represented, in part, a reaction to the holdings in the *Packard Motor Co.* decisions that supervisory personnel constituted an appropriate unit for collective bargaining. The Bill excluded from the definition of employees not only those traditionally defined by the Board as supervisors, namely, those employees with power to hire, transfer, promote, discharge, reward, or discipline other employees, or to effectively recommend such action, see *Ford Motor Co.*, 66 N.L.R.B. 1317, 1325 (1946) and S. Rep. No. 105, *supra*, at 4, but also (1) personnel who fix or make effective recommendations with respect to the amount of wages earned by other employees, and those who make effective recommendations with respect to the application of factors upon which wages are determined, (2) labor relations, time-study, police and guard personnel, and (3) confidential employees. The Bill defined the latter

as any employee "who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." The Committee Report accompanying the bill expressed concern over evidence that in those plants where foremen had been permitted to organize, more work stoppages occurred and productivity dropped. H.R. Rep. No. 245, *supra,* at 14–15.

The definition of supervisor contained in the Senate bill, S. 1126, was more narrowly drawn, paralleling that which had been established by the Board:

> The term "supervisor" means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

But while the Senate Committee was concerned with distinguishing between supervisors vested with "genuine management prerogatives," such as the power to hire, fire, or discipline other employees, and minor supervisors such as "straw bosses, leadmen, [and] set-up men," it expressed the same concerns that had been voiced by the House Committee over the granting of the Act's protections to supervisory personnel. S. Rep. No. 105, *supra,* at 4–5. The Senate Committee felt that the organization of supervisors had upset the balance of power between labor and management, *id.* at 3, and it wished to prevent conflicts of interest, resulting in lower productivity, less discipline, and a correspondingly higher industrial accident rate, *id.*

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at 4-5. The Committee's Report, S. Rep. No. 105, *supra*, at 4, also reflected a resire to prevent the possibility, mentioned in Justice Douglas' dissent in *Packard Motor Co.* v. *NLRB*, *supra*, 330 U.S. at 494, that the Supreme Court's reasoning in that case could be used to justify the unionization of vice-presidents.

The Conference Committee agreed to accept the Senate's definition of supervisors.[8] With reference to those additional employees who had been included

[8] The definition contained in S. 1126 had been modified slightly by the Senate. The Senate agreed to an amendment proposed by Senator Flanders which added the phrase "or responsibility to direct them." See 93 Cong. Rec. 4677-78 (1947): n. 2 *supra*.

The Senate had rejected an amendment to S. 1126, proposed by Senator Langer, that would have replaced the "supervisor" exclusion with an exclusion for "an assistant superintendent or superintendent, or any individual occupying a higher supervisory status than assistant superintendent." 93 Cong. Rec. 5117 (1947). A superintendent would have been defined as "any individual who, within power directly delegated by an owner, president, or board of directors, directs, controls, and administers a specific institution, plant, or function and is responsible for the successful outcome of the undertaking, and who works through assistants or subordinate foremen," and "assistant superintendent" as "any individual having authority to regularly assist a superintendent by performing essentially the same duties as the superintendent." *Id.* Although this definition of superintendent bears some resemblance to the definition of "managerial employee" that has been developed by the Board, the Senate's rejection of this amendment should not be viewed as a rejection of the managerial employee exception. Since the effect of this amendment would have been to permit employees of supervisory status lower than assistant superintendents, such as foremen, to organize, rejection of this amendment is more easily explained by a desire to expand the definition of supervisor to include employees such as foremen than by a desire to treat superintendents and their assistants as employees. See 93 Cong. Rec. 5116 (remarks of Sen. Taft opposing the proposed amendment).

within the House but not within the Senate definition, the Report stated:

> In the case of persons working in the labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. The conference agreement does not treat time-study personnel or guards as supervisors, as did the House bill. Since, however, time-study employees may qualify as professional personnel, the special provisions of the Senate amendment (hereafter discussed) applicable with respect to professional employees will cover many in this category. In the case of guards, the conference agreement does not permit the certification of a labor organization as the bargaining representative of guards if it admits to membership, or is affiliated with any organization that admits to membership, employees other than guards.

H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35–36 (1947).[*]

The best we can make of this history is as follows: The Senate had been persuaded that the House definition would have barred from the protection of the Act too many people who should be within it. But neither the Senate, nor the House in yielding to it, thought the exclusion would be limited to persons precisely fitting the Act's definition of "supervisor." It is quite clear—and the Board does not challenge this—that Congress believed "persons working in the labor rela-

[*] The report was submitted to both houses. 93 Cong. Rec. 6361, 6434 (1947).

tions, personnel and employment departments" would be excluded. However, our sense of the situation is that Congress recognized there were other persons so much more clearly "managerial" that it was inconceivable that the Board would treat them as employees. Surely Congress could not have supposed that, while "confidential secretaries" could not be organized, their bosses could be.[10] In other words, Congress failed to enact the portion of Mr. Justice Douglas' *Packard* dissent relating to the organization of executives, not because it disagreed but because it deemed this unnecessary.

After passage of the Taft-Hartley amendments, the Board at first continued its previous practice of simply excluding "managerial employees" from units of rank and file employees. For example, in *Denver Dry Goods Co.*, 74 N.L.R.B. 1167 (1947), assistant buyers, who were required to set good sales records as examples to other employees, assist buyers in various matters such as the selection of merchandise, and take over the buyers' duties when the latter were absent, were excluded from a unit of sales, clerical and office employees, because their interests were "more closely identified with those of management." The Board stated its policy in *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320, 323 n.4 (1947), a case in which the Board refused to exclude store managers from a store-wide bargaining unit because they were neither managerial nor supervisory employees:

[10] We think that when the Conference Report referred to "confidential secretaries," it used that term with the same meaning which H.R. 3020, as reported, had spelled out for "confidential employees," even though in 1946, the Board had narrowed its definition of confidential employees to those "who exercise 'managerial' functions in the field of labor relations," *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322.

> We have in the past, and before the passage of the recent amendments to the Act, recognized and defined as "managerial" employees, executives who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and have excluded such managerial employees from bargaining units. . . . We believe the Act, as amended, contemplates the continuance of this practice.

The same policy was followed with respect to buyers in *Denton's Inc.*, 83 N.L.R.B. 35, 37 (1949).

In the 1950's the Board went further. In *American Locomotive Co.*, 92 N.L.R.B. 115 (1950), a case in which buyers were excluded from an office and clerical unit because they were authorized to negotiate for credit and to make substantial purchases for their employer, the Board said that, since they were managerial employees, the buyers could "not be accorded bargaining rights under the Act." *Id.* at 117. Then in 1956, the Board, finding a separate unit of procurement drivers, who kept supplies of produce coming into their employer's plant and exercised discretion in meeting competitors' prices, to be an inappropriate unit for collective bargaining because their interests were "allied with management," *Swift & Co.*, 115 N.L.R.B. 752, stated:

> It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management. Such individuals cannot be deemed to be employees for the purposes of the Act.

Id. at 753–54 (footnote omitted).[11] Such was the Board's announced understanding with respect not

[11] In many other cases the Board excluded buyers from units of rank-and-file employees on the ground that they were "managerial" since they could effectively commit their employer's credit. For example:

only to "managerial employees" generally but also to buyers specifically when Congress again extensively amended the National Labor Relations Act in 1959, 73 Stat. 519 *et seq.*

The effect to be given such a history is a delicate and difficult question. *Cf. Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 450 (1948). Viewing more than thirty years of failure by the Federal Trade Commission to assert power over instrastate acts of unfair competition because of their adverse effect on interstate commerce, the Court refused, in *FTC* v. *Bunte Brothers, Inc.*, 312 U.S. 349 (1941), to sanction any such power, despite the famous contrary precedent with respect to the Interstate Commerce Commission in the *Shreveport Case*, 234 U.S. 342 (1914). Mr. Justice Frankfurter wrote, 312 U.S. at 352.

> Authority actually granted by Congress of course cannot evaporate through lack of ad-

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"The duties of the assistant purchasing agent and the buyer include, among others, the placing of orders for various items of supplies and equipment. It appears that they effectively bind the Employer's credit in the regular course of their work. In accordance with established Board practice, we find these employees are managerical employees, and we shall therefore exclude them from the unit."

Florence Stove Co., 98 N.L.R.B. 16, 17 (1952) (footnote omitted). See also *Howard-Cooper Corp.*, 105 N.L.R.B. 753, 754 (1953); *American Lithofold Corp.*, 107 N.L.R.B. 1061, 1063 (1954); *Temco Aircraft Corp.*, 121 N.L.R.B. 1085, 1089 (1958); *Weaver Motors*, 123 N.L.R.B. 209, 215–16 (1959); *Ed's Foodland of Springfield, Inc.*, 159 N.L.R.B. 1256, 1260 (1966). In other cases, the Board has done this on the basis of more specific findings about the buyer's powers. See *Mack Trucks, Inc.*, 116 N.L.R.B. 1576, 1577–78 (1956); *Kearney & Trecker Corp.*, 121 N.L.R.B. 817, 822 (1958); *Federal Tel. and Radio Co.*, 120 N.L.R.B. 1652, 1653–4 (1958); *Albuquerque Division, ACF Industries, Inc.*, 145 N.L.R.B. 403, 414–15 (1963).

> ministrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.

On the other hand, again speaking for the Court, the same Justice said, in *NLRB* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 351–52 (1953), with respect to a post-Taft-Hartley change, in *F. W. Woolworth Co.*, 90 N.L.R.B. 289 (1950), in the method of computing back pay:

> Assuming Congress was aware of the Board's pre-*Woolworth* practice of calculating back pay on the basis of the entire period from discharge to offer of reinstatement, we could say here, as we did in *Gullett Gin* [340 U.S. 361, 366 (1951)], that Congress by its reenactment indicated its agreement that the Board's practice was authorized. That leads us nowhere on the present issue, though it is only this far that what we said in *Gullett Gin* can lead us. In that case as here, again assuming notice, if Congress was satisfied that the Board was acting within its powers, the thing for it to do was what it did—reenact without change. In that case as here—though, of course, we had no occasion to say so in that case—if Congress had been more than satisfied with the Board's practice, if it had wanted to be certain that the Board would not in future profit by its experience, it would have had to do more than it did; it would have had to change the language of the statute so as to take from the Board the discretionary power to mould remedies suited to

> practical needs which we had declared the Board to have and which the Board was asserting and exercising. We cannot infer an intent to withdraw the grant of such power from what is at most a silent approval of specific exercises of it.[12]

Perhaps the best reconciliation of these eminently sensible although seemingly contrary approaches is that when an administrative construction has been long in effect, the agency cannot make a big change, especially after a reenactment or substantial amendment, but can make smaller ones.

The conclusion we reach from all of the foregoing is this: The 1947 Congress clearly believed that at least some "managerial employees" other than "supervisors" were excluded from the protections of the Act.[13] In 1956 the Board concluded that the Congress had meant to exclude all true "managerial employees." This exclusion embraced not only an employee "so closely related to or aligned with manage-

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[12] We are also not unmindful that it "is at best treacherous to find in Congressional silence *alone* the adoption of a controlling rule of law." (Emphasis supplied.) *Girouard* v. *United States*, 328 U.S. 61, 69 (1946), *quoted in Boys Markets, Inc.* v. *Local 770, Retail Clerks Union*, 398 U.S. 235, 241–42 (1970).

[13] Congress may have misapprehended the Board's pre-1947 practice with regard to confidential employees. As indicated in the case cited in fn.10, the Board had apparently excluded such employees from bargaining units of rank and file personnel but had not ruled that they were unprotected by the Act. Thus, when the Conference Committee stated that the Board had treated these employees "as outside the scope of the act," it may have been in error. Nevertheless, since Congress' reason for not expanding the definition of supervisor was its belief that existing Board practices made this unnecessary, that intent should be given effect. See *NLRB* v. *Wheeling Elec. Co.*, 444 F.2d 783 (4 Cir. 1971).

ment as to place the employee in a position of conflict of interest between his employer on the one hand and his fellow workers on the other" but also one who is "formulating, determining and effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties," *Illinois State Journal-Register, Inc.* v. *NLRB,* 412 F.2d 37, 41 (7 Cir. 1969). Both because of what we believe to have been the understanding of the 1947 Congress and because the Board's interpretation of it had been so clearly defined for the 1959 Congress, the Board is not now free to decide the contrary. In this respect we follow the illuminating opinion of Judge Craven, dealing with a confidential secretary, in *NLRB* v. *Wheeling Electric Co.,* 444 F.2d 783 (4 Cir. 1971), and the Eighth Circuit's decision in *North Arkansas Electric, supra,* 446 F.2d 602, although we do not agree with everything said in the latter case. On the other hand, despite the series of decision, see fn.11, typified by *Swift & Co., supra,* 115 N.L.R.B. 752, we do not think the Board would be precluded, on proper proceedings, from determining that buyers, or some types of buyers, are not true "managerial employees" and consequently come within the protection of § 8(a) (5) and (1).

III

It might seem that this conclusion would lead to the grant of enforcement here, since there was substantial evidence that Bell's buyers were not sufficiently high in the hierarchy to constitute "managerial employees," as that term has been defined not only in *Illinois State Journal-Register* v. *NLRB, supra,* but also in such other cases as *International Ladies' Garment Workers' Union* v. *NLRB,* 339 F.2d 116, 123 (2 Cir. 1964) (Marshall, J.); *Retail Clerks International*

Association v. *NLRB*, 366 F.2d 642, 644–45 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1017 (1967) (Burger, J.); and *Westinghouse Electric Corp.* v. *NLRB*, 424 F.2d 1151, 1158 (7 Cir.), *cert. denied*, 400 U.S. 831 (1970) (Fairchild, J.). See also *Continental Ins. Co.* v. *NLRB*, 409 F.2d 727, 730 (2 Cir.), *cert. denied*, 396 U.S. 902 (1969). It does not, for two reasons:

The first is that we cannot be sure that the Board's decision rested on such a factual determination rather than on its new and, in our view, erroneous holding that it was free to regard *all* managerial employees as covered by the Act unless their duties met the "fundamental touchstone" of including "determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization," see fn. 6 *supra*. This requires reversal and remand under the first decision in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943), recently reaffirmed in *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972).

The second is that, while the Board was not precluded from reversing itself on the position that buyers, or some buyers, were not "managerial employees," we hold that, particularly in light of the justified contrary belief the Board had engendered, it could not do this in the manner that was done here. This is an appropriate case in which to give effect to the Supreme Court's observation in the second *Chenery* decision, 332 U.S. 194, 202 (1947), largerly disregarded by the Board for a quarter century:[14]

[14] At argument we asked counsel for the Board to advise us in writing whether it had ever engaged in the rule-making on substantive matters contemplated by § 4 of the Administrative Procedure Act, 5 U.S.C. § 553. In a memorandum dated February 12, 1973, counsel advised us that the Board has recently concluded one such proceeding by promulgating a standard for the exercise of jurisdiction over private colleges and universi-

> The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.

Such a holding is also in line with the considered dicta in *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969).

Although the precise issues in *Wyman-Gordon* were whether a direction made in a previous decision, *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236 (1966), that was to apply prospectively only, in fact constituted rule-making, which, if such, clearly had not been accomplished as provided in section 4 of the APA, and, if so, whether this invalidated an order, based on the prior decision, in a subsequent adjudicative proceeding, expressions by a majority of the Justices point against the procedure the Board followed here. The plurality opinion of Mr. Justice Fortas, joined by the Chief Justice, Mr. Justice Stewart and Mr. Justice White, emphasized, 394 U.S. at 764:

> The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. . . . They may not be avoided by the process of making rules in the course of adjudicatory proceedings.

Mr. Justice Douglas, dissenting from the holding that the Board's violation in *Excelsior* had been cured in *Wyman-Gordon* because the rule adopted in *Excelsior* was being applied as part of a later adjudicative order, said this, 394 U.S. at 777–79 (footnote omitted):

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ties, 35 Fed. Reg. 18370 (1970) and 29 C.F.R. § 103.1. Also in the summer of 1972 the Board published notices of proposed rule-making on the questions whether to assert jurisdiction over the horseracing and dogracing industries and over symphony orchestras and, if so, what the standard should be. 37 Fed. Reg. 14242, 16818.

> A rule like the one in *Excelsior* is designed to fit all cases at all times. It is not particularized to special facts. It is a statement of far-reaching policy covering all future representation elections.
>
> It should therefore have been put down for the public hearing prescribed by the Act.
>
> The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard. . . .
>
> Agencies discover [through rule-making proceedings] that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice.
>
> * * * * *
>
> I would hold the agencies governed by the rule-making procedure strictly to its requirements and not allow them to play fast and loose as the National Labor Relations Board apparently likes to do.

Mr. Justice Harlan, likewise dissenting, after pointing to the Board's decision to apply the *Excelsior* rule only prospectively as implying that it was "such a departure from pre-existing understandings that it would be unfair to impose the rule upon the parties in pending matters," 394 U.S. at 780–81, continued:

> [I]t is precisely in these situations, in which established patterns of conduct are revolutionized, that rule-making procedures perform the vital functions that my Brother Douglas describes so well in a dissenting opinion with which I basically agree.
>
> * * * * *
>
> Either the rule-making provisions are to be enforced or they are not. Before the Board may be permitted to adopt a rule that so signifi-

cantly alters pre-existing labor-management understandings, it must be required to conduct a satisfactory rule-making proceeding, so that it will have the benefit of wide-ranging argument before it enacts its proposed solution to an important problem.

Despite all this, *Wyman-Gordon* does not supply a bright line for determining just when the Board, or other agencies, must proceed by rule-making. See Bernstein, The NLRB's Adjudication-Rule Making Dilemma. Under the Administrative Procedure Act, 79 Yale L.J. 571 (1970). Certainly the decision does not proscribe the use of adjudication as a vehicle for the formulation of new agency policies, which "are applied and announced therein" and "generally provide a guide to action that the agency may be expected to take in future cases." 394 U.S. at 765–66 (Fortas, J.). But if the statements quoted from the opinions of six Justices in *Wyman-Gordon* are to mean anything, they must be read as demanding rule-making here, and, given the Board's long-standing negative attitude, as requiring a court to order it. The Board was prescribing a new policy, not just with respect to 25 buyers in Wheatfield, N.Y., but in substance, to use Mr. Justice Douglas' phrase, "to fit all cases at all times." 394 U.S. at 777. There must be tens of thousands of manufacturing, wholesale and retail units which employ buyers, and hundreds of thousands of the latter. Yet the Board did not even attempt to inform industry and labor organizations, by means providing some notice though not in conformity with section 4, of its proposed new policy and to invite comment thereon, as it has sometimes done in the past, see Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 729, 756–57 (1961), and did in *Excelsior,* 156 N.L.R.B. at 1238, without thereby satisfying the Supreme Court,

394 U.S. at 764. Although policy-making by adjudication often cannot be avoided in unfair labor practice cases, since the parties have already acted and the Board must decide one way or the other, there is no such problem in a representation case.[15] Finally, the argument for rule-making is especially strong when the Board is proposing to reverse a long-standing and oft-reiterated policy on which industry and labor have relied.[16] To be sure, the change of policy here in question did not expose an employer to new and unexpected liability, as it would have done in *NLRB* v. *Majestic Weaving Co., Inc.* 355 F.2d 854, 859–61 (2 Cir. 1966).[17] The point rather is that when the Board has so long been committed to a position, it should be

[15] While nominally this comes before us as an unfair labor practice case, in substance the attack is on the Board's decision, unreviewable at the time, in the representation proceeding.

[16] Although *Swift & Co.*, 115 N.L.R.B. 752 (1956), may be the only case in which the Board had squarely held that buyers were not entitled to organize in a union separate from rank-and-file employees, the reasoning of the many decisions in fn.11 necessarily led to that result so long as the Board classified almost all buyers as "managerial employees."

A number of the decisions that have upheld the Board's reversing prior decisions in adjudicative proceedings have been in situations where the Board has merely prescribed a stricter remedy. See, *e.g.*, *NLRB* v. *A.P.W. Products Co.*, 316 F.2d 899, 905 (2 Cir. 1963) (retroactively overruling decisions that back pay awards are tolled by examiner's finding of non-violation); *cf International Union of Elec., Radio and Mach. Workers*, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 930 (1970); *H. & F. Binch Co. Plant of Native Laces* v. *NLRB*, 456 F.2d 357, 364–65 (2 Cir. 1972) (enlarging reinstatement rights of economic strikers).

[17] In the *Binch* case, *supra* note 16, we sustained retroactive application of the Board's decision in *The Laidlaw Corporation*, 171 N.L.R.B. No. 172 (1968), *enforced*, 414 F.2d 99 (7 Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), mainly because it had been presaged by an earlier Supreme Court decision.

particularly sure that it has all available information before adopting another, in a setting where nothing stands in the way of a rule-making proceeding except the Board's congenital disinclination to follow a procedure which, as said in *Texaco, Inc.* v. *FPC*, 412 F.2d 740, 744 (3 Cir. 1969), "enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated," despite the Court's pointed admonitions.[18]

The petition to review is granted and enforcement is denied to the extent that the cause is remanded to the Board for further proceedings consistent with this opinion. No costs.

[18] In March 1970 Professor Bernstein proposed "a two-year moratorium on APA rule-making requirements, during which the Board and its special public canvass their alternatives and seek suitable adjustments." *Supra*, 79 Yale L.J. at 620–21. Nearly three years have passed, without significant result.

APPENDIX B

JUDGMENT

United States Court of Appeals for the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of February one thousand nine hundred and seventy-three.

Present: Hon. HENRY J. FRIENDLY, *Chief Judge,* Hon. JAMES L. OAKES, Hon. WILLIAM T. TIMBERS, *Circuit Judges*

BELL AEROSPACE COMPANY DIVISION OF TEXTRON INC.

v.

NATIONAL LABOR RELATIONS BOARD

A petition to review an order of the National Labor Relations Board and a cross-petition to enforce that order.

This cause came on to be heard on a certified list of items comprising the record of the National Labor Relations Board and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the petition to review be and hereby is granted.

It is further ordered, adjudged, and decreed that enforcement of the order of the said Board be and it hereby is denied to the extent that the action be and it hereby is remanded to the said Board for further proceedings without costs consistent with the opinion of this Court.

A. DANIEL FUSARO, *Clerk.*

APPENDIX C

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 3—CA—4695

BELL AEROSPACE, A DIVISION OF TEXTRON, INC. AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AMALGAMATED LOCAL 1286

DECISION AND ORDER

Upon a charge filed on December 2, 1971, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Amalgamated Local 1286, herein called the Union, and duly served on Bell Aerospace, a Division of Textron, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 3, issued a complaint on December 21, 1971, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 12, 1971, following a Board election in Case 3—RC—4987 the

503-935—73——4

Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about December 9, 1971, and at times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On January 3, 1972, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On February 2, 1972, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 9, 1972, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause called Company's Brief in Opposition to Motion for Summary Judgment and in Support of Petition for Reconsideration.

Upon the entire record in this proceeding, the Board makes the following:

RULING ON THE MOTION FOR SUMMARY JUDGMENT

In its answer to the complaint, the Respondent denies the appropriateness of the unit and in its

[1] Official notice is taken of the record in the representation proceeding, Case 3—RC—4987, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151; *Intertype Co.* v. *Penello*, 269 F. Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378, enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

response to the Notice To Show Cause, it specifically argues that the unit employees are managerial employees and, as such, are excluded from the coverage of the Act for representational purposes. We find no merit in this position.

Based on the representation hearing in Case 3—RC—4987, the Board issued its Decision and Direction of Election (190 NLRB No. 166) finding that a separate unit of buyers was appropriate for collective-bargaining purposes. The Board rejected the Respondent's two contentions: (1) that the buyers were managerial employees and, as such, not entitled to representation rights under the Act and (2) that an alleged conflict would exist if the buyers, whether managerial or not, were granted representation rights.

In the directed election conducted by the Regional Director on June 16, 1971, the Union received 15 votes, a majority of the 24 votes cast. The Respondent filed timely objections to conduct affecting the results of the election. In substance, the objections alleged that one of the sample ballots had been marked in the "Yes" box and that, since the Respondent had conducted no campaign against the Union and had not attempted to influence the voters, the resulting vote would not have favored the Union if the sample ballot had remained unmarked. After investigating the objections, the Regional Director, on June 28, 1971, issued his Report on Objections recommending that, absent evidence presented by the Respondent or adduced in his investigation that the Union was responsible for the defacement, the objections should be overruled, and the Union be certified.

The Respondent filed with the Board timely exceptions to the Report on Objections reiterating its objections. On August 12, 1971, the Board issued its Sup-

plemental Decision and Certification of Representative, finding that the objections raise no material issue of fact or law which would warrant reversal of the Regional Director's findings and recommendations or require a hearing. Accordingly, the Board certified the Union as exclusive representative of the Respondent's buyers.

Subsequently, the Respondent filed with the Board a Motion for Reconsideration of the Board's Decision and Direction of Election in light of the adverse decision of the United States Court of Appeals for the Eighth Circuit denying enforcement of the Board's Order in *North Arkansas Electric.*[2] In its motion, it argued that, since the Board had relied in the instant representation Case 3—RC—4987 on its decision in *North Arkansas Electric* wherein a "managerial" employee was held entitled to the protection of the Act, and since the court had judged "managerial" employees to be excluded from the protection of the Act, the Board should reconsider its previous decision and dismiss the representation petition. On May 1, 1972, the Board issued its Order Denying Motion (196 NLRB No. 127) in which, after due consideration of the court's opinion in the *North Arkansas Electric* case, it denied the Respondent's Motion for Reconsideration and found again that buyers herein constituted a separate appropriate unit for collective-bargaining purposes. In its response to the Notice To Show Cause the Respondent reiterated its arguments in support of the Motion for Reconsideration.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to reliti-

[2] *North Arkansas Electric Corporation, Inc.* v. *N.L.R.B.*, 466 F.2d 602, denying enforcement, 185 NLRB No. 83.

gate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.[4]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Delaware corporation, has maintained its principal office and place of business at Wheatfield, New York, herein called the Wheatfield

[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67 (f) and 102.69(c).

[4] In its answer to the complaint and in its response to the Notice To Show Cause, the Respondent contends, in effect, that its admitted refusal to bargain was not violative of the Act because the Union's certification was not final in view of the pendency of the Motion for Reconsideration and, therefore, no obligation to bargain arose from the certification. We find no merit in this contention as subsec. 102.65(e) of the Rules and Regulations which deals, *inter alia*, with motions for reconsideration in representation cases, provides in subpar. (3) that "the filing and pendency of a motion under this provision shall not unless so ordered operate to stay the effectiveness of any action taken or directed." See also subsec. 102.48(d) as to the same practice in unfair labor practice cases.

plant, where it is, and has been at all times material, employed in research and development in the design and fabrication of aerospace products. During the past year, the Respondent, in the course and conduct of its business operations, purchased, transferred, and delivered to its Wheatfield plant, goods and materials valued in excess of $50,000 of which goods and materials valued in excess of $50,000 were transported to said plant directly from States of the United States other than the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Amalgamated Local 1286, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All buyers in Department 121, the Purchasing and Procurement Department, at the Respondent's Wheatfield, New York, plant, excluding all production and maintenance employees, all office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On June 16, 1971, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 3 designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on August 12, 1971, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about November 9, 1971, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about November 9, 1971, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since November 9, 1971, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate,

and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company* d/b/a *Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F. 2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F. 2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Bell Aerospace, a Division of Textron, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Amalgamated Local 1286, is a labor organization within the meaning of Section 2(5) of the Act.

3. All buyers in Department 121, the Purchasing and Procurement Department, at the Respondent's Wheatfield, New York, plant, excluding all production and maintenance employees, all office clerical employees, professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 12, 1971, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about November 9, 1971, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interefered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Bell

Aerospace, a Division of Textron, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Amalgamated Local 1286, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All buyers in Department 121, the Purchasing and Procurement Department, at the Respondent's Wheatfied, New York, plant, excluding all production and maintenance employees, all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Wheatfield, New York, plant and location copies of the attached notice marked "Appen-

dix."[5] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C.

[SEAL] EDWARD B. MILLER,
Chairman,

JOHN H. FANNING,
Member,

HOWARD JENKINS, JR.,
Member,

RALPH E. KENNEDY,
Member,

National Labor Relations Board.

[5] In the event that this order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board, an Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Amalgamated Local 1286, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All buyers in Department 121, the Purchasing and Procurement Department, at the Respondent's Wheatfield, New York, plant, excluding all production and maintenance employees, all office clerical employees, professional employees, guards and supervisors as defined in the Act.

BELL AEROSPACE, A DIVISION OF TEXTRON, INC.
(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Ninth Floor, Federal Building, 111 West Huron Street, Buffalo, New York 14202, Telephone 716—842-3100.

APPENDIX D

DECISION AND DIRECTION OF ELECTION

Case 3-RC-4987

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before James J. Palermo, Hearing Officer. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, by direction of the Regional Director for Region 3, this case was transferred to the National Labor Relations Board for decision. Briefs have been filed by the Employer and the Petitioner.

The Board has reviewed the Hearing Officer's ruling made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, including the briefs filed by the parties, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. The Petitioner seeks to represent in a single unit all employees in the Purchasing and Procurement Department of the Employer's Wheatfield, New York, plant classified as buyers. However, near the close of the hearing, the Petitioner proposed that if

the buyers alone did not constitute a separate appropriate unit, Petitioner was willing to expand the unit and include certain other employees from the Purchasing and Procurement Department. The Employer maintains that neither unit is appropriate. Its principal opposition to the petition is that the buyers are managerial employees and do not constitute an appropriate unit for purposes of collective bargaining under the Act. With the issuance of the Board's decision in *North Arkansas Electric Cooperative, Inc.*,[1] the Employer has supplemented its position and now maintains that the buyers, whether managerial or not, may not be given representation rights.

In *North Arkansas Electric*, we found that, with the limitations there noted, "managerial" employees are employees within the meaning of the Act and entitled to its protection. In our opinion their *prima facie* status as employees under the Act ordinarily entitles them not only to the protection of the Act, but to the full benefits of the Act and the right to be represented for the purposes of collective bargaining. Therefore, even though, as the Employer argues, the buyers may be "managerial" employees, we are of the view that as employees they are entitled to be represented under the Act, unless there is some cogent reason for denying such representation.[2]

[1] 185 NLRB No. 83.

[2] Member Jenkins sees nothing in the record to support the Employer's contention that these employees exercise managerial functions, and considers them "employees" within the meaning of the Act to the same extent as production and maintenance employees. Member Kennedy is of the view that the Board must find, in this case, that the buyers are managerial employees, to support its conclusion that the buyers constitute an identifiable, homogeneous, and, hence, separately appropriate unit. He would so find in this case.

The Employer contends that there is such a reason. It argues that buyers, whether considered managerial or not, are to be denied representation because there would exist a potential conflict of interest between the buyers as union members and the Employer. Essentially the Employer maintains that the potential conflict is in the fact that the buyers have authority to commit the Employer's credit in enormous aggregate amounts, select vendors, cancel contracts and substitute other vendors, and negotiate purchase prices." In this connection, the Employer argues that if union considerations were to influence the buyers' decisions regarding vendor selection and prices, buyers could be more receptive to bids from union contractors as opposed to non-union contractors and adversley affect the Employer's business. The Employer further contends that the buyers could influence decisions as to "make or buy" items in favor of "make," thus creating additional work for sister unions in the plant and that with the restrictions on hiring and discharging of employees, which might come with certification, it would be at a hardship in dealing with its employees should the above-mentioned events occur.

On the record, we find no merit in the Employer's position. While it is true that the buyers are in a position to commit the Employer's credit, the record reveals that the discretion and latitude for independent action must take place within the confines of the general directions which the Employer has established. Thus policy guides for "make or buy" decisions can clearly be established and enforced, so that any possible temptation to allow sympathy for sister unions to influence such decisions could effectively be controlled the buyers cannot commit the Employer's credit for amounts above $5,000 without the concurrence of

higher authority. Procurement Director Seitz testified regarding the procedure likely to be followed when a buyer recommends a purchase order in excess of $5,000, that "of course as it [the cost] goes up the level of review more people get to look at it. More people get to question it. They question the buyer's discretion, his judgment, how did you arrive at the conclusion this is a good package which he is offering for approval." Nor can they cancel an order and select an alternate vendor without the concurrence of other officials if the amount involved exceeds $5,000. Testimony also tends to show that in many instances the type of item to be procured will limit the buyer to a particular vendor.

Thus the record fails to convince us that the purchasing discretion of the buyer's is either presently so unbridled or potentially so uncontrollable as to create the possible problems of which the Employer complains. The problems raised seem to be more in the nature of unsupported conjecture.

Nor do we find any merit in the Employer's contention that any hiring and discharge restrictions likely to follow certification will affect its ability to deal with the employees. The Employer would still retain the power to discipline or discharge employees for improper performance of duty, subject only to such limitations as he might agree to during negotiations. Experience under the Act indicates no reason to believe that employers generally lightly bargain away their disciplinary control over employees, and we see no reason why any different situation should be contemplated here.

Accordingly, as the evidence before us fails to demonstrate that representation of the buyers would necessarily create a conflict of interest in the circum-

stances here present,[3] and as we have otherwise found that they are entitled to the protection of the Act, we find the Employer's apprehensions insufficient to deprive the buyers of representation. We therefore find that a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. We find on the basis of the foregoing that the following employees of the Employer constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All Buyers in Department 121, the Purchasing and Procurement Department, at the Employer's Wheatfield, New York plant, excluding all production and maintenance employees, all office clerical employees, professional employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 3 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not

[3] We are of the view that this is a factual issue, to be determined on the record of each case, in which any particular segment of managerial employees may seek to be represented by a labor organization.

work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[4] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by International Union, United Automobile,

[4] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N. L. R. B. v. Wyman-Gordon Co.*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 3 within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Aerospace and Agricultural Implement Workers of America, Amalgamated Local 1286.

Dated, Washington, D.C., May 20, 1971.

[SEAL] EDWARD B. MILLER,
Chairman,
JOHN H. FANNING,
Member,
GERALD A. BROWN,
Member,
HOWARD JENKINS, Jr.,
Member,
RALPH E. KENNEDY,
Member,
National Labor Relations Board.

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Decision and Direction of Election [1] issued by the National Labor Relations Board on May 20, 1971, a secret ballot election was conducted by the Regional Director for Region 3 on June 16, 1971, under the direction and supervision of the Regional Director among the employees in the unit found appropriate. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 24 eligible voters, 24 cast ballots, of which 15 were for, and 9 against, the Petitioner. Thereafter, the Employer filed timely objections to conduct affecting the results of the election.

In accordance with the Board's Rules and Regulations, the Regional Director investigated the issues raised by the objections, and on June 28, 1971, issued

[1] 190 NLRB No. 66.

his Report on Objections in which he recommended that the objections be overruled and that the participating labor organization be certified as the collective-bargaining representative in the appropriate unit. Thereafter, the Employer filed timely exceptions contending that the Regional Director erred in overruling its objections.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Regional Director's Report, the exceptions thereto, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Regional Director.[2]

Accordingly, as the objections to the election have been overruled, and as the tally of ballots shows that the Union has received a majority of valid votes cast, we shall certify it as exclusive bargaining representative for the employees in the appropriate unit.

CERTIFICATION OF REPRESENTATIVE.

IT IS HEREBY CERTIFIED that Local 1286, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America has been designated and selected by a majority of the employees employed by the Employer in the unit heretofore found by the Board to be appropriate, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, said labor orga-

[2] In our opinion, the exceptions to the Regional Director's Report on Objections raise no material issue of fact or law which would warrant reversal of the Regional Director's findings and recommendations or require a hearing.

nization is the exclusive representative of all such employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Dated, Washington, D.C., August 12, 1971.

[SEAL]

JOHN H. FANNING,
Member,

GERALD A. BROWN,
Member,

RALPH E. KENNEDY,
Member,

National Labor Relations Board.

APPENDIX E

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 3—RC—4987

BELL AEROSPACE COMPANY, DIVISION OF TEXTRON, INC. EMPLOYER, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AMALGAMATED LOCAL 1286, PETITIONER

ORDER DENYING MOTION

This case originally arose upon a petition filed by the Union seeking to represent in a single unit the buyers employed in the Purchasing and Procurement Department of the Employer's Wheatfield, New York, plant. The Employer opposed such a unit, essentially on the grounds that the buyers were managerial employees and as such were not entitled to representation rights under the National Labor Relations Act, as amended. Additionally, the Employer contended that whether or not the buyers were considered managerial, they should not be given representation rights because a potential conflict of interest with management might exist if the buyers were represented by a union.

The National Labor Relations Board, on May 20, 1971, found a unit of buyers appropriate for the purposes of collective bargaining.[1] In answer to the Employer's contentions regarding the buyers' alleged

[1] 190 NLRB No. 66.

managerial status, the Board, citing *North Arkansas Electric Cooperative, Inc.*,[2] stated:

> In *North Arkansas Electric,* we found, with the limitations there noted, "managerial" employees are employees within the meaning of the Act and entitled to its protection. In our opinion, their *prima facie* status as employees under the Act ordinarily entitles them not only to the protection of the Act, but to full benefits of the Act and the right to be represented for the purposes of collective bargaining.

The Board rejected the Employer's further contention that an alleged conflict would exist if the buyers were granted representation rights, and directed an election in the unit found appropriate.[3]

Subsequently, on August 18, 1971, the Employer filed with the Board a Motion for Reconsideration of the Board's Decision and Direction of Election. It argued, in material part, that since the Board's decision herein, the United States Court of Appeals for the Eighth Circuit had occasion to rule on the rights of managerial employees under the Act and judged that "managerial" employees were excluded from the protection of the Act. The court there denied enforcement of the Board's Order in *North Arkansas Electric.*[4] As the Board's decision in *North Arkansas Electric* was relied on to some extent in the Board's finding that a unit of buyers was appropriate in the instant proceeding, the Employer requests that the Board, in the light of the circuit court's decision, re-

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[2] 185 NLRB No. 83.

[3] An election was conducted on June 16, 1971, in which a majority of the employees voted for the Union. On August 12, 1971, the Union was certified as exclusive bargaining agent for the Employer's buyers.

[4] *North Arkansas Electric Corporation, Inc.* v. *N.L.R.B.*, 446 F.2d 602.

consider its previous decision and dismiss the petition herein.

The Court of Appeals for the Eighth Circuit, in the *North Arkansas Electric* case, reviewed the legislative history of Section 2(3) of the Act, which defines the term "employees" as "any employee" and Section 2(11) which defines "supervisors." The court concluded that although the Board's practice of excluding "managerial" employees from rank-and-file bargaining units was not specifically referred to in that history, the Congress must nevertheless have been aware of the Board's stated policy and the failure of Congress "to change the statute to specifically include managerial employees as 'employees' either in 1947 or in subsequent years must be given some weight by this court." The court then went on to review a number of Board decisions in which managerial employees were excluded from bargaining units and noted specifically the Board's holding in *Swift & Company*, 115 NLRB 752, 753—754, to the effect that:

> It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management. Such individuals cannot be deemed to be employees for the purposes of the Act.

In addition, the court referred to several court of appeals decisions which described Board law as excluding, as managerial employees, "those who formulate, determine and effectuate an employer's policies" and approving such Board law as consistent with congressional intent.

The court further rejected this Board's approach in the decision which it was reviewing, which argued for the exclusion from the coverage of the Act of only such managerial employees as "participated in the formation, determination or effectuation of manage-

ment policy *with respect to employee relations matters.*"

With all due respect to the court, we have considerable difficulty with its analysis of the legislative history. It is quite true that the Congress rejected amendments to the definition of "employee" which would have made specific an exclusion of labor relations personnel and confidential employees. The conference report submitted to the Senate deleted these amendments "since the Board had treated, and presumably would continue to treat, such persons as outside the scope of the Act." The rationale underlying the Board's history of excluding such employees rests of course upon the premise that conflicts of interest are likely to arise between the collective employee group represented by a labor organization and personnel working as, with, or for management representatives whose area of responsibility includes bargaining with such a labor organization.

But it is a long leap to reason that because Congress declined to amend the Act to exclude a specific type of managerial personnel it thereby meant *all* managerial personnel, conceivably even those whose only "managerial" functions involve a determination of what sources of supply should be used in making purchases of less than $5,000.

Yet, the Employer here argues, with some force, that the broad language of the court's opinion in *North Arkansas Electric* would indeed indicate that that court believed that the Congress had specifically intended to affirm what is said to be preexisting Board policy with respect to the entire scope and meaning of the term "managerial employees," used in whatever context by this Board.

We do not agree with so broad an interpretation. The Congressional silence with respect to managerial

employees in general, when considered in the specific context of the legislative history, does not, we think, indicate any intent as to Board policy in this broad area, nor does it suggest that the Congress explored any facet of this problem other than the Board's treatment of personnel associated with the formulation and implementation of labor relations policies.

The court was on firmer ground, however, in its review of Board and court decisions which preceded the Board's decision in *North Arkansas Electric.* It cannot be gainsaid that this Board had, prior to *North Arkansas Electric,* stated on a number of occasions its intent to exclude from bargaining units "those who formulate, determine, and effectuate an employer's policies." But the question which faced us in *North Arkansas Electric* and which faces us again here, albeit in a somewhat different setting, is whether there is a basis in the statute or in commonsense for denying statutory protection and representational rights to all employees who have *any* discretion in the formulation, determination, and effectuation of *any* employer policy.

It is clear enough, as the legislative commentary and commentary in several of our own decisions has explained, that there is sound basis for the exclusion of those concerned with management policies in the labor relations area. There, the potential for conflict of interest is apparent and thus an orderly administration of this Act requires the exclusion of such personnel from coverage.

And it may be that other than purely labor relations managerial employees should unquestionably be excluded because of their responsibility with respect to policies which are inextricably intertwined and of necessity affect or impinge upon the labor relations area. For instance, a corporate representative, charged

with the duty of determining where an employer's plants should be located or what capital expenditures a corporation ought to make, may well have such broad managerial discretion as to necessarily involve the determination of matters affecting employment and employment policies that he should be excluded from coverage. It may be that his decisions inevitably will encompass the field of labor relations, even though corporate organization charts may not, on their face, classify him as charged directly with labor relations policymaking.

A like analysis might also dictate the exclusion of those bearing primary responsibility for determination of financial policies, or even those charged with the direction of basic policies in the field of research and development. We make no attempt to list in detail all those managerial types who ought properly to be excluded. Nor did we in *North Arkansas,* where the only relevant consideration was the employee's lack of authority with respect to labor relations matters.

But throughout any attempted analysis must run the common thread of an examination as to whether the duties and responsibilities of any managerial employee or group of managerial employees do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization. That is the fundamental touchstone.

If we find, upon the facts of any case, that the probabilities of such conflict are sufficiently minimal, then in the absence of congressional mandate we would see no commonsense reason to deny such persons the opportunity to freely engage in concerted activity and the right to decide for themselves whether or not they wish to be represented in their dealings with their employer by a labor organization.

In our original decision in this case we set forth our reasons for finding that it had not been demonstrated that representation of buyers with limited and specific "policy" responsibility would necessarily create a conflict of interest in the circumstances there present, and we further found that there was a sufficient community of interest among these buyers so that they constituted a separate appropriate unit for collective bargaining. After due consideration of the court opinion in the *North Arkansas Electric* case, we remain of the same view.

Accordingly, the Employer's Motion for Reconsideration is denied.

ORDER

It is hereby ordered that the Motion for Reconsideration herein be, and it hereby is, denied.

Dated, Washington, D.C., May 1, 1972.

[SEAL]

EDWARD B. MILLER,
Chairman,

JOHN H. FANNING,
Member,

HOWARD JENKINS, Jr.,
Member,

RALPH E. KENNEDY,
Member,

National Labor Relations Board.

APPENDIX F

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees, of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent

contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

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